

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ENERGY NORTHWEST, a Washington  
municipal corporation,

Plaintiff,

v.

SPX HEAT TRANSFER, INC., a  
Delaware corporation; SPX HEAT  
TRANSFER LLC, a Delaware limited  
liability company,

Defendants.

2:13-CV-05151-SAB

**AGREED PROTECTIVE  
ORDER**

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the  
following Protective Order is hereby entered by the Court.

**1. Proceedings and Information Governed.**

This Order and any amendments or modifications hereto (“Protective  
Order”) shall govern any document, information or other thing furnished by any  
party, to any other party, and includes non-parties who receive a subpoena in  
connection with this action. The information protected includes, but is not limited  
to, answers to interrogatories, answers to requests for admissions, responses to  
requests for production of documents, deposition transcripts and videotapes,  
deposition exhibits, and other writings or things produced, given or filed in this  
action that are designated by a party as “Confidential Information” (hereinafter

1 "CI") or "Confidential Attorney Eyes Only Information" (hereinafter "AEO  
2 Material") in accordance with the terms of this Order, as well as to any copies,  
3 excerpts, abstracts, analyses, summaries, descriptions, or other forms of recorded  
4 information containing, reflecting, or disclosing such information.

5 **2. Designation and Maintenance of Information.**

6 For purposes of only this Protective Order, (a) the "CI" designation shall  
7 mean that the document is comprised of commercial information which is not  
8 publicly known, the disclosure of which would provide a competitor with an  
9 advantage; documentation evidencing policies, procedures, training materials,  
10 customer information, trade secrets, contracts, employee files, and any other  
11 sensitive commercial information regardless of format; documentation revealing  
12 sensitive or personal data or information; and documentation that the providing  
13 party is under a legal or contractual obligation to maintain as confidential; and (b)  
14 the "AEO Material" designation shall mean that the document is comprised of  
15 information in Paragraph 2(a) that the producing party deems especially sensitive.  
16 CI and AEO Material does not include, and this Protective Order shall not apply  
17 to, information that is already in the knowledge or possession of the party to  
18 whom disclosure is made unless that party is already bound by agreement not to  
19 disclose such information, or information that has been disclosed to the public or  
20 third persons by someone other than the receiving party and who is not under a  
21 legal or contractual obligation to maintain the confidentiality of the information, in  
22 a manner making such information no longer confidential.

23 **3. Designation.**

24 Documents and things produced during the course of this litigation within  
25 the scope of paragraph 2(a) above, may be designated by the producing party as  
26 containing CI by placing on each page and each thing a legend substantially as  
27 follows: **CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE**  
28 **ORDER.**

1 Documents and things produced during the course of this litigation within  
2 the scope of paragraph 2(b) above may be designated by the producing party as  
3 containing Confidential Attorney Eyes Only Information by placing on each page  
4 and each thing a legend substantially as follows: **CONFIDENTIAL**

5 **ATTORNEY EYES ONLY INFORMATION SUBJECT TO PROTECTIVE  
6 ORDER.**

7 A party may designate information disclosed at a deposition as CI or AEO  
8 Material by requesting the reporter to so designate the transcript or any portion  
9 thereof at the time of the deposition. If no such designation is made at the time of  
10 the deposition, any party shall have five (5) business days after the date of receipt  
11 of the deposition transcript to designate, in writing, to the other parties and to the  
12 court reporter, whether the transcript is to be designated as CI or AEO Material. If  
13 no such designation is made at the deposition or within such five (5) business day  
14 period (during which period, the transcript shall be treated as AEO Material,  
15 unless the disclosing party consents to less confidential treatment of the  
16 information), the entire deposition will be considered devoid of CI or AEO  
17 Material.

18 Each party or non-party that designates CI or AEO Material for protection  
19 under this Protective Order must take care to limit any designation to specific  
20 material that qualifies under the appropriate standards. The designated party must  
21 designate for protection only those parts of material, documents, items, or oral or  
22 written communications that qualify, so that other portions of the material,  
23 documents, items, or communications for which protection is not warranted are  
24 not swept unjustifiably within the ambit of this Protective Order.

25 **4. Maintain Confidentiality.**

26 It is the responsibility of counsel for each party to maintain materials  
27 containing CI or AEO Material in a secure manner and appropriately identified so  
28 as to allow access to such information only to such persons and under such terms

1 as is permitted under this Protective Order.

2 **5. Inadvertent Failure to Designate.**

3 The inadvertent failure to designate or withhold any information as  
4 confidential or privileged will not be deemed to waive a later claim as to its  
5 confidential or privileged nature, or to stop the producing party from designating  
6 such information as confidential at a later date in writing and with particularity.

7 The information shall be treated by the receiving party as confidential from the  
8 time the receiving party is notified in writing of the change in the designation.

9 **6. Challenge to Designations.**

10 Unless a prompt challenge to a designating party's confidentiality  
11 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary  
12 economic burdens, or a significant disruption or delay of the litigation, a party  
13 does not waive its right to challenge a confidentiality designation by electing not  
14 to mount a challenge promptly after the original designation is disclosed. The  
15 parties must make every attempt to resolve any dispute regarding confidential  
16 designations without Court involvement. Any letter to the Court regarding  
17 confidential designations or for a protective order must include a statement in the  
18 letter that the parties have engaged in a good faith meet-and-confer conference in  
19 an effort to resolve the dispute without Court action. The statement must list the  
20 date, manner, and participants to the conference. A good faith effort to confer  
21 requires a face-to-face meeting or a telephone conference. If the parties are unable  
22 to resolve a challenge without Court intervention, the parties may thereafter seek  
23 the Court's intervention through the submission of one-page letter in accordance  
24 with the protocol described by the Court in the June 2, 2014 scheduling  
25 conference. Until any dispute under this paragraph is ruled upon by the Court, the  
26 designation shall remain in full force and effect, and the information shall continue  
27 to be accorded the confidential treatment required by this Protective Order.

28 ///

1 **7. Disclosure and Use of Confidential Information.**

2 Records designated as CI may be disclosed only to the following persons:

3 a. The attorneys working on this action, including in-house attorneys;

4 b. All paralegal, assistants, stenographic and clerical employees working

5 under the direct supervision of such counsel;

6 c. Any parties to this action who are individuals, and the employees,

7 directors, members, or officers of parties to this action who are corporations

8 or partnerships, and their insurers, to the extent necessary to further the

9 interest of the parties in this litigation;

10 d. Subject to those persons or entities identified on Exhibit B, experts

11 and consultants to whom disclosure is reasonably necessary for this

12 litigation, who are expressly retained by any attorney described in paragraph

13 7(a). and who have signed the Confidentiality Agreement attached hereto as

14 Exhibit A;

15 e. Witnesses who appear for deposition or trial in this matter, during the

16 course of their testimony, upon the witness being advised of the need and

17 agreeing to keep the CI confidential and who have signed the

18 Confidentiality Agreement attached hereto as Exhibit A;

19 f. The Court; and

20 g. Copy, imaging, and electronic document vendors retained by any

21 attorney described in paragraph 7(a) to assist in the duplication and/or

22 hosting of confidential material, provided that counsel for the party

23 retaining the vendor instructs the vendor not to disclose any confidential

24 material to non-parties and to return all originals and copies of any CI;

25 **8. Clawback Agreement**

26 The provisions of any mutually agreed upon “clawback” agreement relating

27 to the inadvertent disclosure of privileged information shall apply in all cases

28 governed by this Protective Order.

1 **9. Disclosure and Use of AEO Material**

2 Records designated as AEO Material may be disclosed only to the following  
3 persons:

- 4 a. The attorneys working on this action on behalf of any party, including  
5 in-house attorneys;
- 6 b. All paralegal, assistants, stenographic, and clerical employees  
7 working under the direct supervision of such counsel;
- 8 c. Subject to those persons or entities identified on Exhibit B, experts  
9 and consultants to whom disclosure is reasonably necessary for this  
10 litigation, who are expressly retained by any attorney described in paragraph  
11 9(a), and who have signed the Confidentiality Agreement attached hereto as  
12 Exhibit A;
- 13 d. The Court; and
- 14 e. Copying, imaging, and electronic document vendors retained by any  
15 attorney described in paragraph 9(a) to assist in the duplication, imaging,  
16 and/or housing of AEO Material, provided that counsel for the party retaining  
17 the vendor instructs the vendor not to disclose any AEO Material to non-  
18 parties and to return all originals and copies of any AEO Material.

19 **10.** A receiving party, including any experts or consultants, may use CI or AEO  
20 Material that is disclosed or produced by another party or by a non-party in  
21 connection with this case only for prosecuting, defending, or attempting to settle  
22 this litigation. The Parties wish to avoid any CI or AEO Material from being  
23 disclosed or disseminated to any third party who could use that information for  
24 competitive advantage. The Parties also seek to avoid any conflicts of interest.  
25 Accordingly, attached hereto as Exhibit B is a list of entities that each Party deems  
26 to be an entity with the potential to use its information for competitive advantage  
27 and/or would have a conflict of interest. In the event that either Party seeks to  
28 retain an expert (either as a consulting expert or a testifying expert) that is on

1 Exhibit B or an employee of an entity on Exhibit B, that Party shall notify the  
2 other Party of the identity of the individual. Upon receipt of such information, the  
3 Party receiving such information shall have ten (10) business days to provide a  
4 written objection. In the event of receipt of such an objection, the designating  
5 Party shall not provide the proposed expert any CI or AEO Material unless and  
6 until, upon Motion to the Court, the Party seeking to retain the expert is given  
7 leave by the Court to do so.

8 **11.** CI or AEO Material may be disclosed to a person, not already allowed  
9 access to such information under this Protective Order, if:

- 10 a. the information was previously received or authored by the person or  
11 was authored or received by a director, officer, employee or agent of the  
12 company for which the person is testifying as a Rule 30(b)(6) designee;
- 13 b. the designating party is the person or is a party for whom the person  
14 is a director, officer, employee, consultant or agent; or
- 15 c. counsel for the party designating the material agrees that the material  
16 may be disclosed to the person.

17 In the event of disclosure under this paragraph, only the reporter, the person,  
18 his or her counsel, the judge and persons to whom disclosure may be made, and  
19 who are bound by the Protective Order, may be present during the disclosure or  
20 discussion of CI or AEO Material. Disclosure of material pursuant to this  
21 paragraph shall not constitute a waiver of the confidential status of the material so  
22 disclosed.

23 **12. Filing Documents With the Court.**

24 In the event that any party wishes to submit CI or AEO Material to the  
25 Court, such party shall follow the procedures prescribed by the Court for filing  
26 documents under seal, if said procedures apply.

27 **13. No Prejudice.**

28 Producing or receiving confidential information, or otherwise complying

1 with the terms of this Protective Order, shall not (a) operate as an admission by  
2 any party that any particular confidential information contains or reflects trade  
3 secrets or any other type of confidential or proprietary information; (b) prejudice  
4 the rights of a party to object to the production of information or material that the  
5 party does not consider to be within the scope of discovery; (c) prejudice the rights  
6 of a party to seek a determination by the Court that particular materials be  
7 produced; (d) prejudice the rights of a party to apply to the Court for further  
8 protective orders; or (e) prevent the parties from agreeing in writing to alter or  
9 waive the provisions or protections provided for herein with respect to any  
10 particular information or material.

11 **14. Conclusion of Litigation.**

12 Within sixty (60) calendar days after final judgment in this action, including  
13 the exhaustion of all appeals, or within sixty (60) calendar days after dismissal  
14 pursuant to a settlement agreement, each party or other person subject to the terms  
15 of this Protective Order shall be under an obligation to destroy or return to the  
16 producing party all materials and documents containing Confidential Information  
17 or Confidential Attorney Eyes Only Information, and to certify to the producing  
18 party such destruction or return. However, outside counsel for any party shall be  
19 entitled to retain all court papers, trial transcripts, exhibits and attorney work  
20 product, provided that any such materials are maintained and protected in  
21 accordance with the terms of this Protective Order. Alternatively, the parties may  
22 agree upon appropriate methods of destruction.

23 **15. Other Proceedings.**

24 By entering this Order and limiting the disclosure of information in this  
25 case, the Court intends that a receiving party be precluded from disclosing another  
26 party's documents in any other case. In the event that any person or parties subject  
27 to this Protective Order may be subject to a motion to disclose another party's  
28 information designated CI or AEO Material pursuant to this Protective Order, the

1 party in receipt of such motion shall promptly notify the disclosing party of the  
2 motion so that the disclosing party may have an opportunity to appear and be  
3 heard on whether that information should be disclosed.

4 **16. Remedies.**

5 Prior to the conclusion of this lawsuit by final judgment or settlement, any  
6 party may petition the Court for good cause shown, in the event such party desires  
7 relief from a term or condition of this Order.

8 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
9 file this Order and provide copies to counsel.

10 **DATED** this 3<sup>rd</sup> day of September, 2014.



11  
12  
13  
14 Stanley A. Bastian

15 Stanley A. Bastian  
16 United States District Judge  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2 **Exhibit A**  
3  
4  
5  
6

7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF WASHINGTON

9 ENERGY NORTHWEST, a  
10 Washington municipal corporation,

11 Plaintiff,

12 v.

13 SPX HEAT TRANSFER, INC., a  
14 Delaware corporation; SPX HEAT  
15 TRANSFER LLC, a Delaware limited  
16 liability company,

17 Defendants.

18

19 **CONFIDENTIALITY**  
20 **AGREEMENT**

21 This Confidentiality Agreement (“Agreement”) is entered into as of  
22 \_\_\_\_\_, 201\_\_\_\_ (“Effective Date”) by and between  
23 \_\_\_\_\_ (“Party”) and \_\_\_\_\_ (“Third-  
24 Party”).

25 WHEREAS Party desires for Third-Party to provide services in connection  
26 with the above-captioned litigation.

27 WHEREAS in connection with the Third-Party’s services, Party will be  
28 required to provide Third-Party with certain information that has been deemed  
Confidential Information or Confidential Attorney Eyes Only Information by the

1 parties in the above referenced litigation, and by Court Order (“CI” or “AEO  
2 Material”).

3 WHEREAS, as a condition of release of the CI or AEO Material, Party requires  
4 Third-Party to execute this Agreement.

5 NOW, THEREFORE the Third-Party hereby represents and warrants that the  
6 Third Party has read the Protective Order dated \_\_\_\_\_, 2014 and agrees to  
7 abide by its terms and conditions in all respects. The Third Party hereby agrees  
8 that any violation of this Confidentiality Agreement may be enforced by the  
9 sanctions set forth in Rule 37(b) of the Federal Rules of Civil Procedure and such  
10 other sanctions as may be available to the Court, including the power to hold  
11 parties or other violators of the Protective Order in contempt. The Third Party  
12 further agrees that all other remedies available to any person(s) injured by a  
13 violation of this Protective Order are fully reserved.

14 Dated this \_\_\_\_ day of \_\_\_\_\_, 201\_\_.

15 \_\_\_\_\_  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2 **Exhibit B**  
3

4 **1.** Babcock Power  
5 **2.** Thermal Engineering International  
6 **3.** Holtec International  
7 **4.** Maarky Thermal Systems  
8 **5.** Graham Manufacturing  
9 **6.** DC Fabricators  
10 **7.** Foster Wheeler  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28